NO. 22668

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLEN LEVAIR JORDAN
ALVINA LaJAN JOHNSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

LARRY S. FLAX
Assistant U. S. Attorney

1200 United States Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America

NO. 22668

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLEN LEVAIR JORDAN
ALVINA LaJAN JOHNSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

LARRY S. FLAX
Assistant U. S. Attorney

1200 United States Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America

TOPICAL INDEX

TABLE OF AUTHORITIES

Constitution

NO. 22668

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLEN LEVAIR JORDAN,
ALVINA LaJAN JOHNSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF ISSUES

1. Was the arrest of defendant Jordan proper and was the subsequent search of his residence valid?

a. Did the information given to the agents by James Jordan taint the search of defendant Jordan's residence?

b. Was the arrest of defendant Jordan based upon probable cause?

c. Was the search of defendant Jordan's residence valid as a search incident to his arrest?

2. Is the statutory rule of evidence permitting conviction upon evidence of unexplained possession of heroin constitutional?

3. Is the statutory rule of evidence permitting conviction upon evidence of unexplained possession of marihuana constitutional?

4. Does §4705(a), of Title 26, United States Code, violate defendants' privilege against self-incrimination?

5. Was the delay in indicting the defendants a denial of defendants' due process rights?

6. Could the jury find that the evidence was sufficient from a qualitative test?

7. Did the court fail to instruct the jury that the indictment is not evidence of the guilt of the accused?

8. Did the court abuse its discretion by failing to grant a severance?

9. Did the court err in denying the motion for a mistrial after Agent Krueger testified as to defendant Jordan's refusal to give permission for a search?

10. Is the "concurrent sentence doctrine" valid?

II

STATEMENT OF FACTS

On April 24, 1967, Agent William Jackson, of the Federal Bureau of Narcotics, and an informant went to the vicinity of 35th Street and Jefferson Boulevard in Los Angeles. They picked up a man named Small and drove to the 900 block of East 35th Street and parked the car. Small and Agent Jackson exited the car and walked across the street to the passenger side of a gray 1967 Buick Riviera [R. T. 292]. 1/

Agent Jackson gave Small $320 of Government funds and Small reached in the window of the Buick and gave the money to defendant Jordan. Jordan gave Small a small rubber condom containing heroin which Small gave to Agent Jackson [R. T. 159, 293].

After dropping Small off, Agent Jackson and the informant met with surveillance agents and a Marquis reagent field test was performed on the substance in the condom, with positive results [R. T. 294].

On April 28, 1967, Agent Jackson met again with the informant and they rode to the area of 1200 East 25th Street and met Small. Small got into the car and they drove to Adams and Hoover Street where Small made a phone call. They then drove to the 900 block of East 35th Street and parked the car. A 1966

1/ "R. T." refers to Reporter's Transcript of Proceedings.

golden colored Cadillac parked in front of the informant's car. Agent Jackson and Small went over to the Cadillac which was driven by defendant Jordan [R. T. 301].

Agent Jackson gave Small $320 of Government funds which Small gave to defendant Jordan [R. T. 301-302]. Jordan gave Small a rubber condom containing heroin, which Small gave to Agent Jackson [R. T. 169, 302]. Agent Jackson asked defendant Jordan how much he would charge for a half ounce of cocaine and Jordan told him $350 [R. T. 302].

Small and Agent Jackson returned to the informant's car and they then dropped Small off. Agent Jackson and the informant met with the surveillance agents. A Marquis reagent test was performed on the substance in the condom and a positive reaction was observed [R. T. 302].

On June 15, 1967, Agent Jackson and the informant drove to the 1200 block on East 25th Street [R. T. 303]. Small got into their car and they went again to Adams and Hooper where Small placed a phone call. They then proceeded to 42nd Place and Denker. Agent Jackson and Small went across the street to a gray Karmann Ghia in which defendant Johnson was sitting [R. T. 304].

Agent Jackson gave Small $620 of Government funds and Small got into the car with defendant Johnson. He then gave the $620 to defendant Johnson and she counted the money. She then reached up over the sun visor and took down a napkin wrapped package and gave it to Small [R. T. 304].

Small got out of the Karmann Ghia and gave the package to Agent Jackson. The package contained two rubber condoms containing heroin [R. T. 171, 304]. They then dropped Small off and met with surveillance agents and a Marquis reagent test was performed on the substance in the condoms with a positive reaction [R. T. 305, 307].

On July 27, 1967, Agent Joseph Krueger arrested James Jordan at the Terminal Annex Post Office, in downtown Los Angeles [R. T. 5]. James Jordan was arrested on the basis of an arrest warrant issued in the name of John Doe alias James Jordan [R. T. 21]. The basis for issuing the warrant in that name was the 1967 Riviera which was registered to James Jordan. The car was parked in front of James Jordan's address on April 24, 1967. The Cadillac used on April 28, 1967 was leased to a Jordan, and the general description of the man who sold to Agent Jackson fit him [R. T. 26, 27].

Agent Krueger took James Jordan back to the Federal Building and met with Agent Jackson [R. T. 7]. Agent Jackson looked at James Jordan and told Agent Krueger that he was not the man that he had purchased narcotics from [R. T. 25]. James Jordan was then told by Agent Krueger who asked him for his help [R. T. 25].

James Jordan directed them to the address of his brother Allen Jordan at 4527 West 64th Street [R. T. 9, 31-32]. Agents Krueger, Jackson and Paulus went to the door with James Jordan

and the bell was rung by Jordan. There was no answer. A short while later, defendant Johnson arrived in a late model Cadillac, parked and came to the door. She was placed under arrest pursuant to a warrant issued in the name of Jane Doe, alias Alvina Barryman, which was the married name of Miss Johnson. She was fully advised of her constitutional rights [R. T. 11-12].

She was asked where defendant Jordan was and she told the agents that he had taken the children some place [R. T. 16]. She was carrying two bags of groceries and she asked if she could put them in the kitchen (they had been standing on the porch) [R. T. 10, 15]. The agents told her she could and she asked them and her brother-in-law if they would like to take a seat in the living room, which they did [R. T. 15].

After putting the groceries away, she called Agent Krueger into the bedroom to ask his permission to put on some undergarments. In the bedroom, she told Agent Krueger that it would be all right for the agents and her brother-in-law to wait in the house for Jordan's return after she left to be taken downtown [R. T. 18, 19].

After she left, Jordan returned and was arrested on the basis of the warrant, which the agents believed still good, and on the basis of probable cause as Agent Jackson was present [R. T. 20, 21]. Jordan was advised of his constitutional rights following his arrest [R. T. 28, 29].

Agent Krueger asked defendant Jordan for permission to search his house and Jordan refused and, following discussion of

a search warrant. Agent Krueger then searched the premises and after searching the bedroom he came to a closet at which time defendant Jordan said, "You'll find it all there on the second shelf in a blue bag." Agent Krueger retrieved a blue airline flight bag which contained a quantity of several different types of narcotics [R.T. 179, 181].

III

ARGUMENT

A. THE ARREST OF DEFENDANT, JORDAN WAS PROPER AND THE SUBSEQUENT SEARCH OF DEFENDANT JORDAN'S RESIDENCE WAS VALID AS A SEARCH INCIDENT TO HIS ARREST

1. THE INFORMATION GIVEN BY JAMES JORDAN AS TO DEFENDANT JORDAN'S RESIDENCE WAS NOT OBTAINED THROUGH IMPROPER POLICE ACTIVITY, AND DID NOT TAINT THE SEARCH OF DEFENDANT JORDAN'S RESIDENCE

The arrest of James Jordan at the Terminal Annex Post Office was a valid arrest pursuant to a valid arrest warrant.

> "Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and

that the defendant has committed it . . . . '"

Giordenello v. United States, 357 U.S. 480, at 485 (1957).

In the Giordenello case, supra, relied upon by the defendant, the court found that the complaint set forth only the conclusion of the complainant and was in no respect based upon his personal knowledge. Therefore, the court concluded that there was no probable cause to issue the complaint and the warrant would be invalid.

In the case at bar the complaint is a valid one and meets both requirements of Rules 3 and 4 above. The complaint [Exhibit #1, R.T. 454] sets forth that:

"Thomas Small; John Doe aka James C. Jordan knowingly and unlawfully sold to Agent William R. Jackson of the Federal Bureau of Narcotics of [sic] 24.100 grams of heroin, a narcotic drug, which, as the defendants then and there well knew, had been imported into the United States of America contrary to United States Code, Title 21, Section 174."

And the complainant states that this complaint is based on:

"I personally observed and have been informed of the above transaction. The substance which was sold by Small and aka

Jordan has been analyzed and found to contain heroin."

This complaint was signed and sworn to by Agent Krueger. This was a valid complaint setting forth both the essential facts constituting the offense charged and the probable cause that the named individuals committed it. Agent Krueger drew this complaint on good faith with reasonable grounds to believe that the individuals named in the complaint were in fact the individuals he had observed during the transaction. Agent Krueger based this belief on the fact that a 1967 Riviera used in the April 24th transaction was registered to James Jordan. It was parked in front of James Jordan's address on April 24, 1967, and the Cadillac used on April 28th was also leased to a "Jordan". Also the general description of the man who sold to Agent Jackson, under Agent Krueger's surveillance, fit James Jordan [R. T. 26, 27]. In fact, the defendant's opening brief calls James Jordan the defendant's "look-alike brother" (Appellants' Opening Brief, p. 12).

Therefore, when James Jordan was arrested he was arrested pursuant to a valid warrant and was properly brought to the Federal Building for questioning. When it was learned, that he was not the man who had sold to Agent Jackson he was released from custody and volunteered to cooperate with the agents in directing them to his brother [R. T. 25].

Even if it were to be conceded that the agents acted without authority in arresting James Jordan it would not appear

that his statements directing them to defendant Allen Jordan's residence could taint the product of the subsequent search of that residence under the doctrine of Wong Sun v. United States, 371 U.S. 471 (1962).

Under Wong Sun any statements obtained illegally, which may lead to any evidence, will be sufficient to cause the evidence to be suppressed from use against the person making those statements. Wong Sun v. United States, supra, at page 488. Here the only person who would have standing, if such statements were obtained illegally, would be James Jordan not the defendant Allen Jordan.

2. DEFENDANT WAS ARRESTED UPON PROBABLE CAUSE AND THEREFORE THE ARREST WAS VALID EVEN IF THE WARRANT WAS DEFECTIVE

Conceding that the arrest of Allen Jordan was not made under the authority of a valid warrant, West v. Cabell, 153 U.S. 78 (1894), the arrest was still made upon reasonable grounds independent of the arrest warrant. 26 U.S.C.A. 7607. And the law is clear that an arrest made under the authority of a defective warrant may be justified by establishing the existence of probable cause for the arrest independent of the warrant.

Go-Bart v. United States, 282 U.S. 344 (1930);

United States v. Hall, 348 F.2d 837, 841-842 (2 Cir. 1965), cert. denied 382 U.S. 997 (1965);

Bell v. United States, 371 F. 2d 35 (9 Cir. 1967); Ferganchick v. United States, 374 F. 2d 559 (9 Cir. 1967).

In fact, this Honorable Court in Bell v. United States, supra, following and referring to United States v. Hall, supra, stated:

> "In that case there was a warrant which the Government conceded to be invalid. It argued, as it does in this case, that the arrest was nevertheless lawful because of the existence of the required reasonable grounds to believe that the arrested person had committed the crime. The defendant there urged that the fact that a warrant, though an invalid one, had been obtained conclusively demonstrated that there was sufficient time to obtain a warrant and, that being so, the arrest without a warrant was illegal.
>
> "The court in Hall declined to 'impose on the law of arrest a requirement thus far confirmed to the law of search and seizure.' Judge Friendly's opinion in Hall, at pages 841-842, cites and quotes from the pertinent judicial precedents and other writings and concludes that the arrest was lawful and that the admissions made by the defendant shortly after the arrest

were admissible in evidence. We agree with the Hall decision and opinion and will not further discuss it here."

Bell v. United States, supra, p. 37.

Probable cause exists if the facts and circumstances known to the officer would cause a reasonable, cautious, and prudent man having the specialized knowledge of an enforcement officer to believe that a felony had been committed.

Draper v. United States, 358 U.S. 307 (1959);

Brinegar v. United States, 338 U.S. 160 (1949);

Burk v. United States, 287 F.2d 117 (9 Cir. 1961), cert. denied 369 U.S. 841 (1961).

When the agents left the Federal Building, they thought they were still acting under a valid arrest warrant [R.T. 20, 21]. They had determined that the defendants were the tenants of a residence at 4527 West 64th Street [R.T. 505, 21-25, 506, 1-13, 31-32]. Both Agent Jackson and Agent Krueger were present at the arrest of the defendants [R.T. 23, 24]. Thus, the arrests were made on reasonable grounds as Agent Jackson was there to identify both defendants as the individuals from whom he had purchased narcotics and Agent Krueger had participated in the surveillance of the transactions [R.T. 20, 21].

3. THE SEARCH OF DEFENDANT JORDAN'S RESIDENCE WAS VALID AS A SEARCH INCIDENT TO A VALID ARREST

As incident to a lawful arrest, a contemporaneous search is permissible and lawful of the premises where the arrest occurs, if the premises are under the control and possession of the arrested person. The permissible area of the search may extend to, and include, the entire premises under the arrested person's control and possession.

United States v. Rabinowitz, 339 U.S. 56 (1950);

United States v. Di Re, 332 U.S. 581 (1948);

Harris v. United States, 331 U.S. 145 (1947);

Williams v. United States, 273 F.2d 781 (9 Cir. 1960);

United States v. White, 342 F.2d 379 (4 Cir. 1965).

In the instant case, the agents had received permission from defendant Johnson to enter the residence and wait there for the arrival of defendant Jordan [R.T. 10, 15, 18, 19]. It had already been determined that this was the residence of the defendants [R.T. 505, 21-25, 506, 1-13, 31-32]. After arresting the defendant, when he came into the residence, Agent Krueger searched the house as a search incident to the defendant's arrest [R.T. 20, 28, 29, 404].

As this was a search incident to a valid arrest, it was not necessary for the agents to have obtained a search warrant. This

3. THE SEARCH OF DEFENDANT JORDAN'S RESIDENCE WAS VALID AS A SEARCH INCIDENT TO A VALID ARREST

As incident to a lawful arrest, a contemporaneous search is permissible and lawful of the premises where the arrest occurs, if the premises are under the control and possession of the arrested person. The permissible area of the search may extend to, and include, the entire premises under the arrested person's control and possession.

United States v. Rabinowitz, 339 U.S. 56 (1950);

United States v. Di Re, 332 U.S. 581 (1948);

Harris v. United States, 331 U.S. 145 (1947);

Williams v. United States, 273 F. 2d 781 (9 Cir. 1960);

United States v. White, 342 F. 2d 379 (4 Cir. 1965).

In the instant case, the agents had received permission from defendant Johnson to enter the residence and wait there for the arrival of defendant Jordan [R. T. 10, 15, 18, 19]. It had already been determined that this was the residence of the defendants [R. T. 505, 21-25, 506, 1-13, 31-32]. After arresting the defendant, when he came into the residence, Agent Krueger searched the house as a search incident to the defendant's arrest [R. T. 20, 28, 29, 404].

As this was a search incident to a valid arrest, it was not necessary for the agents to have obtained a search warrant. This

case is not within the rule of Trupiano v. United States, 344 U.S. 699 (1952), as suggested by the defendants' opening brief. There the court was concerned with the situation where law enforcement officers had known for weeks the location of a farm where illegal activity was taking place and proceeded to search without a warrant.

In the present case, the agents left the Federal Building in an effort to find the defendants. They could not be sure they would find the defendants at this address and had no grounds for the issuance of a search warrant at that time.

B. THE STATUTORY RULE OF EVIDENCE PERMITTING CONVICTION UPON EVIDENCE OF UNEXPLAINED POSSESSION OF HEROIN IS NOT UNCONSTITUTIONAL

It is clear that the provision in Title 21, United States Code, §174, which permits conviction upon a showing of unexplained possession of the narcotic drug heroin, functions as a " . . . statutory rule of evidence . . . . " Erwing v. United States, 323 F.2d 674, 679 (9 Cir. 1963). Cf. United States v. Gainey, 380 U.S. 63 (1965). As this Court said:

> "Thus the function of 'possession' in the statutory scheme is to shift to the defendant the burden of identifying the legitimate source of the narcotic drug, if indeed they were not illegally imported. This statutory rule of

evidence rests upon (1) the rational relationship between 'possession' of narcotic drugs by the defendant and knowledge on his part that a substance which is normally imported and rarely imported legally, was in fact imported contrary to law, plus (2) as a corollary, the consideration that the 'possessor' of the narcotic drugs has so much more convenient access to the facts as to their source that it is not unreasonable to require him to come forward with an explanation. Hernandez v. United States, 300 F. 2d 114, 118, 119 (9th Cir. 1962)."

The Supreme Court and this Court have repeatedly upheld the rationality of this rule when dealing with heroin. Yee Hem v. United States, 268 U.S. 178 (1925). In Juvera v. United States, 378 F. 2d 433 (9 Cir. 1967), this Court described the charge of unconstitutionality as " . . . an utterly groundless assertion." When the challenge arose in a prosecution under Title 21, United States Code, §176(a), this Court rejected it. Zaragoza v. United States, 389 F. 2d 468 (9 Cir. 1968).

In United States v. Gainey, 380 U.S. 63 (1965), an analogous statutory inference was sustained by the Supreme Court. It said:

" . . . the constitutionality of the legislation depends upon the rationality of

the connection 'between the facts proved and the ultimate fact presumed' [citation]. The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." (at pp. 66, 67.)

This Court recognized the rationality, when heroin is the narcotic drug, in two recent cases. Verdugo v. United States, No. 20,803 (9 Cir. 1968) slip opinion; Morgan v. United States, 391 F. 2d 237, 238 (9 Cir. 1968). In both cases, the court relied upon statutory sources and common experience. It can, of course, also rely on its collegiate experience of many years and thousands of cases, like those cited, and like this one, where the evidence shows the foreign origin of the contraband.

The report by the U. S. Treasury Department, Bureau of Narcotics, for the year ended December 31, 1966, entitled "Traffic In Opium and Other Dangerous Drugs" states:

"There are two main currents of illicit traffic in opium and the opiates; one from the Middle East to North America; the other from southeast Asia to Hong Kong, Japan, China

(Taiwan) and the west coast of North America. Secondary flows include routes from Mexico to the United States. The American continent is a principal target of the illicit heroin traffic." (at p. 31.)

Granting the rationality of this rule of evidence, defendants have no standing here to raise it. The evidence established defendants in possession of heroin and the direct evidence supports a conclusion that the heroin was imported contrary to law and that the defendants knew it.

The adoption of defendants' position regarding the statutory rule would vastly increase the already great difficulty of controlling the illegal, clandestine traffic in heroin. The only beneficiaries would be the importers, distributors and wholesalers engaged in this illicit industry. The Constitution does not require, and sound policy forbids this result, unless a compelling, overriding interest can be shown. Congress and the President, in enacting these statutes, have said none exists, and defendants have not given this Court any reason to contradict that judgment.

The provision which reads " . . . unexplained possession of a narcotic drug is sufficient evidence to authorize a conviction . . . " does not shift or change the burden of proof.

The statute and the presumption merely have the effect of shifting to the defendant the burden of going forward with evidence, i.e. with his defense. The burden of proof is always with the

Government to prove the defendant's guilt beyond a reasonable doubt.

Roviard v. United States, 358 U.S. 53, 63 (1957);
Chavez v. United States, 343 F. 2d 85 (9 Cir. 1965);
Gonzalez v. United States, 162 F. 2d 870 (9 Cir. 1947).

The provision which reads " . . . unexplained possession of a narcotic drug is sufficient evidence to authorize . . . " does not deprive the defendant of his Fifth Amendment right against self-incrimination. The defendant's right to remain silent is not infringed upon.

The defendant is neither required nor forbidden to testify by Title 21, United States Code, §174. The argument that this section violates the defendant's Fifth Amendment rights has been repeatedly rejected for many years. Indeed in Yee Hem v. United States, supra, the Supreme Court held:

> "The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to

negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution."

In United States v. Gainey, 380 U.S. 63, 70 (1965), the District Court instructed the jury regarding the statutory provisions authorizing the inference of guilt from the defendant's unexplained presence at a still site in a case where the defendant was convicted of illegal possession of a still. The Circuit Court held:

"We do not consider that the single phrase 'unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the

satisfaction of the jury' can be fairly understood as a comment on the petitioner's failure to testify."

In Orozco-Vasquez, et al. v. United States, 344 F. 2d 827 (9 Cir. 1965), the court pointed out that the contention that the provision in Title 21, United States Code, §174 requiring the defendant to explain possession of narcotics is unconstitutional and violates the defendant's Fifth Amendment rights against self-incrimination had been repeatedly held to have been without merit. See also:

Brown v. United States, 370 F. 2d 374 (9 Cir. 1963);

Agobian v. United States, 323 F. 2d 693 (9 Cir. 1963);

Cellino v. United States, 276 F. 2d 941 (9 Cir. 1960);

Yee Hem v. United States, supra.

C. THE STATUTORY RULE OF EVIDENCE PERMITTING CONVICTION UPON EVIDENCE OF UNEXPLAINED POSSESSION OF MARIHUANA IS NOT UNCONSTITUTIONAL

Title 21, United States Code, §176(a) provides in pertinent part that:

"Whenever . . . the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession

to the satisfaction of the jury."

This Court has held there is no merit in the contention that this presumption is unconstitutional. Jefferson v. United States, 340 F. 2d 194, 199 (9 Cir. 1965). The presumption's validity has been affirmed repeatedly by this and other Circuit Courts. E. g., Caudillo v. United States, 253 F. 2d 513 (9 Cir. 1958), cert. denied, sub nom., Romero v. United States, 357 U. S. 931 (1958); Hunter v. United States, 339 F. 2d 425 (9 Cir. 1964); Borne v. United States, 332 F. 2d 565 (9 Cir. 1964); Zaragoza v. United States, 389 F. 2d 468 (9 Cir. 1968); Robinson v. United States, 327 F. 2d 618 (8 Cir. 1964); Charles Toy v. United States, 266 Fed. 326 (2 Cir. 1920). (In Leary v. United States, 392 U. S. 903 (1968), certiorari has been granted as to this issue.)

The possession clause of §176(a) is not violative of the Fifth Amendment privilege against self-incrimination.

Defendants contend that the "possession" clause produces a statutory compulsion to testify or explain without any further constitutional safeguards irrespective of whether a cautionary instruction is given on possession. However, the approved Mathes and Devitt Jury Instruction dealing with the possession clause clearly points out that "defendant explains" does not mean "defendant testify". The instruction provides:

"To aid enforcement, Section 176(a) of Title 21, United States Code, further provides

that: 'whenever on trial for a violation of this . . . the defendant is shown to have or to have had possession of the marihuana, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.'

"However, this statute does not change the fundamental rule that the accused is presumed innocent until proved guilty beyond a reasonable doubt. Nor does it impose upon the accused any burden or duty to produce proof that the marihuana was lawfully imported, or any other evidence. As previously stated, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged.

"What the statute means is that, upon a trial for a violation thereof, if the jury should find beyond a reasonable doubt that the accused has had possession of the marihuana, as charged, the fact of such possession alone, unless explained to the satisfaction of the jury by the evidence in the case, permits the jury to draw the inference and find that the marihuana was imported or brought into the United States of America contrary to law; and to draw the further inference and find

that the accused had knowledge that the marihuana was imported or brought in contrary to law.

"In connection with any explanation offered for possession of the marihuana, you are reminded that, in the exercise of constitutional rights, the accused need not testify. Possession may be explained to the satisfaction of the jury through other circumstances, and other evidence in the case, independent of testimony of the accused" [R. T. 644, 645.]

Anthony v. United States, 331 F. 2d 687 (9 Cir. 1964);

Medrano v. United States, 315 F. 2d 361 (9 Cir. 1963);

United States v. Kapsalis, 313 F. 2d 875 (7 Cir. 1963);

United States v. Norton, 310 F. 2d 718 (2 Cir. 1962);

Ivey v. United States, 310 F. 2d 227 (4 Cir. 1962), cert. denied 327 U. S. 929, 83 S.Ct. 873, 9 L. ed. 2d 733 (1963);

Perez v. United States, 297 F. 2d 12 (5 Cir. 1961);

Teasley v. United States, 292 F. 2d 460 (9 Cir. 1961);

See also: Brothers v. United States, 328 F. 2d 151, (9 Cir. 1964);

Costello v. United States, 324 F. 2d 260 (9 Cir. 1963), cert. denied 376 U. S. 930, 84 S. Ct. 699, 11 L. Ed. 2d 650 (1964).

It is obvious that when the "possession" clause in issue is read in light of the accompanying possession jury instruction that such clause does not violate the Fifth Amendment privilege against self-incrimination.

D. SECTION 4705(a) DOES NOT VIOLATE DEFENDANTS' PRIVILEGE AGAINST SELF-INCRIMINATION.

Defendant's primary contention is that their conviction for sale of narcotics without obtaining the requisite order form from the buyer violated their privilege against self-incrimination. The relevant statute, Section 4705(a) of Title 26, United States Code, prohibits any sale of narcotic drugs unless the buyer furnishes "a written order . . . on a form . . . issued in blank for that purpose by the Secretary or his delegate." In support of their contention that compliance with this statutory requirement would have incriminated them thus rendering this Section unconstitutional, defendants cite three recent United States Supreme Court cases, Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968).

Marchetti, Grosso and Haynes expressly derived their basic rationale from Albertson v. S.A.C.B., 382 U.S. 70 (1965). In Albertson, the statutory requirement that Communist party members complete and file a registration form was held violative of the Fifth Amendment's prohibition of compulsory self-incrimination. The focal point of the Albertson decision was the finding that Communist registration statutes, rather than being "neutral on their face and directed at the public at large," were "directed at a highly selective group inherently suspect of criminal activities." Albertson thus enunciated the standard

that the Court was to follow in subsequent cases. Albertson v. S.A.C.B., 382 U.S. 70, 79 (1965); See Marchetti, supra, at 47; Grosso, supra, at 64; Haynes, supra, at 96.

Adhering to Albertson, the Court in Marchetti and Grosso, found that registration and tax requirements imposed on gamblers violated the Fifth Amendment. The fact that gambling was illegal in forty-nine states meant that registration requirements aimed at this selective group amounted to little more than a purposeful plan to gather evidence from citizens in order to aid in securing their convictions.

> "Whatever else Congress may have meant to achieve, an obvious purpose of this statutory system clearly was to coerce evidence from persons engaged in illegal activities for use in their prosecution."
>
> 390 U.S. at 74 (Justice Brennan concurring)

Similarly, in Haynes, compulsory registration of only those types of firearms (sawed-off weapons, machine guns, silencers) commonly used in illegal pursuits by a "selective group inherently suspect of criminal activities" was found violative of the Fifth Amendment.

> "These limitations [length of weapon, silencers, etc.] . . . were apparently intended to guarantee that only weapons used principally by persons engaged in unlawful activities would be subjected to taxation . . . . It is pertinent to note

that the Committee on Ways and Means of the House of Representatives, while reporting in 1959 on certain proposed amendments of the Act, stated that the 'primary purpose of [The Firearms Act] was to make it more difficult for the gangster element to obtain certain types of weapons. The type of weapon with which these provisions are concerned are the types it was thought would be used primarily by the gangster-type element.' "

390 U.S. at 87-88, N. 4.

In striking down these regulatory provisions, the Court applied the general Fifth Amendment standard that to be invalid there must be a "real and appreciable" hazard of self-incrimination in the registration scheme. Grosso, supra, at 67; Rogers v. United States, 340 U.S. 367, 374 (1951). The Court made clear that such danger was found because, as in Albertson, rather than registration provisions aimed at effecting regulation of non-criminal as well as criminal activity ("neutral on their face and directed at the public at large") these regulations were designed to ferret out and coerce information from one selective group -- those engaged in illegal activities.

1. DEFENDANTS, AS SELLERS, WERE NOT COMPELLED TO ACQUIRE AN ORDER FORM NOR TO DIVULGE ANY INCRIMINATORY INFORMATION

The order form provision under which defendants were convicted is designed to effectuate the congressional purpose that sales of narcotics be made only to authorized purchasers. The purchaser, never the seller, is under an obligation to apply for and obtain the order form and submit the required information. The only requirement imposed by Section 4705(a) upon the seller is that he not sell until the buyer provides a written order form obtained from the Government. Unlike the situations in Albertson, Marchetti, Grosso and Haynes, the seller is not required to pay any tax, submit any information to the Government, or file any registration application. Thus, Section 4705(a) compelled nothing of defendants; accordingly, the privilege against compulsory self-incrimination could not have been violated. Support for this conclusion is found in the leading post-Marchetti case, deciding that Section 4705(a) does not violate the Fifth Amendment.

> "The statutory language makes manifest . . . that the purchaser of narcotics and not the seller is under compulsion to apply for and obtain the requisite order form. Even if we were to assume arguendo that the . . . purchaser's Fifth Amendment rights [are infringed] . . . it hardly follows that a

seller . . . is immune from prosecution for selling to a person who failed to provide the form. We need cite no authority for the principle that the privilege afforded by the Fifth Amendment is personal and that under the circumstances present here a seller cannot benefit from the privilege allegedly available to the buyer . . . [I]t is clear that standing under the Fifth Amendment is not freely negotiable nor transferable."

United States v. Minor, (2 Cir.) No. 31953, July 3, 1968, at 2954-55.

Insofar as defendant intimates that the privilege would be violated by the administrative regulation requiring the seller to file and keep the buyer's order form in his possession, it would be a sufficient answer that defendants were not charged with violation of this regulation. Even if this were not so and if other provisions were to be found constitutionally suspect, Section 4705(a) can be effectively enforced apart from these other provisions, thus freeing it from constitutional impediment. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936), (concurring opinion of Justice Brandeis), cited in Haynes, supra, at 92. It should also be noted that Title 26, United States Code, Section 7852(a), provides:

"If any provision of this title, or the application thereof to any person or circumstances,

is held invalid, the remainder of the title, and the application to other persons or circumstances, shall not be effected thereby."

2. APPLYING THE CONSTITUTIONAL GUIDELINES OF RECENT SUPREME COURT DECISIONS, SECTION 4705(a) DOES NOT EVIDENCE A STATUTORY SCHEME CREATING SUBSTANTIAL RISK OF SELF-INCRIMINATION

Even viewing Section 4705(a) in the light of defendants' shifting of the possibility of incrimination from buyer to seller, that Section's validity is not affected by the recent Supreme Court decisions discussed above. Those cases were cases where defendants were compelled to give incriminating information demanded by statutory schemes aimed only at select groups known for their criminal activity. In effect, the statutes struck down by the Court were primarily concerned with "asking all thieves in the room to stand up". In sharp contrast, Section 4705(a) is aimed primarily at the regulation of the legitimate market in narcotics:

> "Controls on domestic trade in narcotic drugs directly apply to people who handle, sell, or dispense narcotics for lawful medical purposes; such as physicians, hospitals, pharmacists, retailers, and others."
>
> Report on the Traffic in Opium and Other

Dangerous Drugs, 166, Bureau of Narcotics, (hereinafter cited as "Annual Report")

The multi-million dollar narcotics business is, to a large extent, legal. This vast legal industry is actively regulated by the Federal Bureau of Narcotics during all stages of legitimate distribution, pursuant to comprehensive and inter-related statutes and regulations. See, e.g., 21 C.F.R., Pages 302-307. Through the order form and registration provisions of the narcotics laws, the Bureau closely regulates the domestic distribution among importers, manufacturers, wholesalers, retailers, medical practitioners, hospitals and researchers. That these provisions are designed to regulate legitimate transactions in narcotic drugs is borne out by the fact that, as of December 1966, there were 394,193 registrants under the narcotics laws who were authorized to obtain written order forms from the Government and engage in legitimate transactions in narcotic drugs. See 1966 Annual Report, supra, at 44. Rather than a group "inherently suspect" of criminal activities, this group of nearly 400,000 registrants, contained only one person who was charged with a federal narcotics violation in 1966. See 1966 Annual Report, supra, at 10. Thus, these order forms and other related provisions are regulatory in nature, providing legal methods and procedures for carrying on the legal business of sale and distribution of narcotic drugs.

That the order form provisions of the federal narcotic laws are designed to legitimize, not to incriminate, is

substantiated by the case law in this area. The United States Supreme Court has found that:

> "These order form provisions constitute a needed check on illegal sales, and they are distinctly helpful in the detection of any attempted dealing in, or selling of, the drug free from the tax . . . to punish him for this misuse of the order form is not to punish him for not recording his own crime."
>
> Nigro v. United States, 276 U.S. 332, 346-51 (1928).

In the recent Second Circuit case of United States v. Minor, supra, Section 4705(a) was held not to violate a heroin seller's Fifth Amendment privilege, because only the buyer was required to apply for a form. The Court went on to uphold the statute as applied to a heroin seller, distinguishing it from the statutes in Marchetti, Grosso and Haynes:

> "And, we believe that Section 4705(a) serves an important function within the statutory scheme . . . requiring that sales be made only to persons who have acquired and are able to produce Treasury forms ensures that narcotic drugs will not be transferred to unauthorized purchasers or to those who are likely to evade the payment of taxes. . . . Section 4705(a) ensures that narcotics do not fall into the hands

of those who, for one reason or another, cannot satisfy the registration requirements of Section 4722. And, a seller's failure to fill out or retain the order form in no way affects the statutory purpose of limiting sales to purchasers who are duly authorized to deal in narcotic drugs. ...

"In Marchetti and Grosso the Court placed great emphasis on the wide prohibition against gambling under both federal and state law ... and stressed that the gambling statutes were directed at a 'selective group inherently suspect of criminal activities' ... the firearm registration statutes before the Court in Haynes had the even more apparent purpose of gathering information from possible criminals in order to secure their conviction of various crimes ...

"Section 4705(a), on the other hand, cannot be said to be directed primarily at those 'inherently suspect of criminal activities' .... [I]t was one section of an important and significant statutory scheme regulating the conduct of a lawful business."

United States v. Minor, (2 Cir.) No. 31953, July 3, 1968, at 2957-60.

Prior to Marchetti, Grosso and Haynes, this Court upheld the statutory order form requirements relating to the sale of marihuana, 26 U.S.C. §4742(a); Browning v. United States,

366 F. 2d 420, (9 Cir. 1966). See also Ruiz v. United States, 328 F. 2d 56 (9 Cir. 1964). It should be noted that in these cases, this Court was faced with similar self-incrimination contentions as proposed here by defendants and that the order form provision for marihuana is essentially the same as Section 4705(a).

On the same day that certiorari was granted in Marchetti, certiorari was denied for a marihuana case in which similar Fifth Amendment issues were decided adversely to the defendant. Rule v. United States, 362 F. 2d 215 (5 Cir. 1966), cert. denied 385 U. S. 1018 (1967).

After the Marchetti, Grosso and Haynes decisions, Section 4705(a) was found constitutional in the Second Circuit Minor case, supra. The Fifth Circuit upheld the constitutionality, on the same grounds as Minor, of the order form requirement for marihuana sales, even though there the buyer was the defendant. Leary v. United States, 392 F. 2d 220 (5 Cir. 1968), cert. granted 392 U. S. 903 (1968). Similarly, Judge Wyzanski has recently upheld the marihuana order form's constitutionality under the Fifth Amendment. United States v. Vial, 282 F. Supp. 472 (D. Mass. 1968). See also United States v. Reyes, 280 F. Supp. 267 (S. D. N. Y. 1968); c. f. United States v. McGree, 282 F. Supp. 550 (N. D. Tenn. 1968).

Defendant, in essence, fictitiously poses a statute which requires a seller to submit incriminating evidence, such requirement having as its target the illegal sale of narcotics by

the select group of those involved in such criminal activity. No such statute is at issue. In fact, there can be no case of registration of any illegal narcotics sale, simply because any request for an order form would be denied. Illegality thus precludes registration. This contrasts sharply with the Marchetti-Grosso situation where gamblers engaged in illegal activity were compelled to register and thereby incriminate themselves. There, illegality was in effect the factor prompting the registration requirement. Under Section 4705(a), incrimination, far from being "a real and appreciable hazard" is quite impossible -- i. e., since order forms are reserved for legal sales of narcotics, they will necessarily be absent in illegal sales; they cannot incriminate in such sales. This follows from the fact that Section 4705(a) is designed to legitimize sales rather than record illegal sales.

E. THE LAPSE OF TIME BETWEEN THE FIRST SALE AND THE NOTICE TO THE DEFENDANTS WAS NOT A DENIAL OF DUE PROCESS

The offenses charged in the indictment are governed by the five-year statute of limitations in Title 18, United States Code, §3282. This period of time is usually considered the primary guarantee against bringing overly stale charges. United States v. Ewell, supra, at 122, 383 U.S. 116 (1966).

While the statute of limitations is the primary guarantee to assure the expeditious handling of criminal cases prior to indictment, an unreasonable delay between the date of the offense and the filing of the indictment could be so oppressive as to constitute a denial of due process. Nickens v. United States, 323 F. 2d 808 (D. C. Cir. 1963). This Court has recognized the long-standing rule that the Sixth Amendment right to a speedy trial attaches only after a formal criminal charge has been lodged against a defendant, and that it is only in cases where special circumstances exist that a due process right may attach some time before formal accusation (emphasis added).

United States v. Lucas, supra, at 502-503,
363 F. 2d 500 (9 Cir. 1966);
United States v. Venus, 287 F. 2d 304 (9 Cir.
1960).

While this Court has not expanded on the exact meaning of special circumstances, the Court did point out in Lucas that

it found nothing purposeful, oppressive, or prejudicial in the Government's delay. Other Circuits have held in line with the rationale expressed in Lucas that before the defendant's due process rights were infringed, there must be a showing that there was: (1) an unreasonable delay; (2) prejudice caused the defendant as a result of the delay; and (3) purposeful oppressive and vexatious action on the part of the Government in causing the delay.

United States v. Sanchez, 361 F. 2d 824
(2 Cir. 1966);
Foley v. United States, 290 F. 2d 562
(8 Cir. 1961).

The defendants cite Ross v. United States, 349 F. 2d 210 (D. C. 1965) and Woody v. United States, 370 F. 2d 214 (D. C. 1966) to support their proposition that the delay in notifying the defendants was a denial of due process. A reading of both these cases indicates that they were an attempt by the Court to sanction bad police work.

In the instant case, the agents acted reasonably in the handling of the case. There were three transactions, the first taking place April 24, 1967 [R. T. 292], the second April 28, 1967 [R. T. 301], and the third on June 15, 1967. There is no showing of any unreasonable delay or purposeful action on the part of the Government in the delay between the original transactions and the indictment which was filed in August, 1967 [C. T. 61].[2/]

2/ "C. T." refers to Clerk's Transcript of Record.

F. THE PROSECUTION ONLY HAD TO SHOW THAT SOME MEASURABLE AMOUNT OF A NARCOTIC DRUG WAS IN FACT THE SUBJECT OF THE ACTS CHARGED IN THE INDICTMENT

The law in the Federal Courts does not require that a quantative as well as a qualitative test be performed on the substance which is the subject of the indictment. All that must be shown is that some measurable amount of the narcotic drug was contained in the substance.

Cromer v. United States, 142 F. 2d 697, 698 (D. C. 1944), cert. denied 322 U. S. 760 (1944);

United States v. Wanton, 380 F. 2d 792 (2 Cir. 1967).

G. THE COURT DID NOT FAIL TO INSTRUCT THE JURY THAT THE INDICTMENT IS NOT EVIDENCE OF THE GUILT OF THE ACCUSED

The Court in its instruction of the jury instructed them that an indictment was no evidence.

> "An indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt."
> [R. T. 623.]

H. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO GRANT A SEVERANCE

Joinder of defendant in the same indictment was proper since they participated in the same series of transactions. Federal Rules of Criminal Procedure, Rules 7-8; Williamson v. United States, 310 F. 2d 192 (9 Cir. 1962); United States v. Hoffa, 349 F. 2d 42 (6 Cir. 1965); Nelson v. United States, 375 F. 2d 740 (9 Cir. 1967).

Since joinder in the indictment and for trial was proper, defendants had the burden of showing prejudice resulting from the joinder in order to invoke the trial court's discretion and obtain a severance. In the absence of an affirmative showing that prejudice will result so as to deprive defendant of a fundamentally fair trial, a motion for severance should be denied. Sagansky v. United States, 358 F. 2d 195 (2 Cir. 1966); cf. Williamson v. United States, 310 F. 2d 192 (9 Cir. 1966).

A general, unsupported allegation of prejudice is not sufficient to warrant severance of counts that are properly joined. United States v. Haun, 218 F. Supp. 923 (S. D. N. Y. 1963).

The right to a severance rests with the sound discretion of the trial court. Pointer v. United States, 151 U. S. 396, 400 (1894); United States v. Garrison, 265 F. Supp. 112 (1967); United States v. Hoffa, 349 F. 2d 43 (6 Cir. 1965). Absent an affirmative showing of an abuse of discretion, refusal to sever is not assignable as error. Stilson v. United States, 250 U. S. 583

(1919); Mendez v. United States, 349 F. 2d 650 (9 Cir. 1965), cert. denied, 384 U. S. 1015 (1966). A fortiori, the trial court is not required to grant a severance, sua sponte, absent a showing of prejudice, as distinguished from a conclusory statement that prejudice resulted. Russell v. United States, 288 F. 2d 520 (9 Cir. 1961), cert. denied, 371 U. S. 926 (1962).

Appropriate instructions can obviate any possible confusion between the two defendants to be tried, and confine the jury's consideration to evidence produced as to each particular defendant. Spencer v. Texas, 385 U. S. 554 (1967); Delli Paoli v. United States, 352 U. S. 232, 242 (1957).

The defendants imply that a failure to sever was prejudicial under the doctrine of Bruton v. United States, 391 U. S. 123 (1968). In that case, the Supreme Court held where a co-defendant does not testify, and his confession is admitted which implicates other defendants on trial, then there is a deprivation of the right to be confronted by one's accusers and reversal is required. In Bruton, neither defendant testified or offered any evidence at the trial. Evans v. United States, 375 F. 2d 355 F. 2 at 357 (8 Cir. 1967).

In the instant case neither defendant was denied his right of confrontation as both defendants took the stand. It was also problematical whether reversal would have been required under the retroactive application of Bruton if both defendants had not testified, as neither of the defendants' statements implicated the other.

I. THE COURT DID NOT ERR IN DENYING A MISTRIAL AFTER AGENT KRUEGER TESTIFIED THAT DEFENDANT JORDAN STATED THAT HE WOULD NOT GIVE PERMISSION TO SEARCH THE RESIDENCE.

Following the arrest of defendant Jordan, after he entered his residence (R. T. 404), he was advised of his constitutional rights and indicated that he understood them (R. T. 407, 408). He then asked if the agents had an arrest warrant or a search warrant (R. T. 404, 408). Agent Krueger advised him that he was going to have to search his residence and asked him for permission to do so and defendant Jordan refused to give him permission (R. T. 404-405). It is this refusal which is raised as grounds for reversal by the defendant.

It is conceded by the Government that a valid exercise of one's constitutional rights should not be used against the claimant. But here there is no exercise of any constitutional right. The defendant had already been informed of his rights following his arrest and had indicated he understood them. The defendant then initiated discussion of the arrest and search warrants. There is no indication that his statements were involuntary. Therefore, it appears that his response did not violate any of his Fifth Amendment rights. See Miranda v. Arizona, 384 U.S. 436 (1965). Nor did his refusal to give his permission for the search violate his rights under the Fourth Amendment. He had no right to be free from the search as it

was a valid search incident to his arrest (See Argument A of this brief).

It should also be noted that this refusal by the defendant was adverted to in a non-responsive answer by Agent Krueger (R. T. 404). It was not, as insinuated by the defendant, intentionally solicited by the Government. Moreover, the Judge, at the request of the defendant, admonished the jury that "no inference whatever is to be taken against an individual for in any way exercising or asserting his constitutional rights, rights guaranteed under the Federal Constitution". (R. T. 405). However, the Judge made no finding that any constitutional rights had been violated.

Under the circumstances, assuming this statement was not properly before the jury, it was harmless error. The effect of the statement was nullified by Jordan's later voluntary and unsolicited admission made as Agent Krueger started to search the hall closet:

> "Q. Getting back to the time when you approached the closet, what happened then?
>
> A. I approached the hall closet which is just off the living room and in view of Mr. Jordan and Mr. Jackson, I believe, at that time.
>
> I opened the door and Mr. Jordan turned to me and said, 'You will find it all there on the second shelf.'
>
> I looked on the second shelf and

observed a blue flight bag, such as used by the airlines.

"I removed the flight bag and brought it to the living room and set it down on the table in front of Mr. Jordan and I removed the contents and found a quantity of various contraband." (R. T. 409) (This contraband was the basis for Counts X and XI).

There can be no doubt that the statement by the defendant indicating the location of the contraband was the evidence from which the jury inferred that defendant had guilty knowledge, and not his refusal to consent to the search which the jury had been instructed to disregard.

J. THE "CONCURRENT SENTENCE DOCTRINE" IS VALID

Where a defendant is sentenced to the same period of incarceration on more than one count and the sentences are to run concurrently, the fact that the appellant was validly convicted on any one count precludes reversal regardless of the validity of the convictions on the other counts.

Hirabayashi v. United States, 320 U.S. 81 (1943);

Sherman v. United States, 320 F.2d 137, 156 (9 Cir. 1963);

Noah v. United States, 304 F.2d 317, 318 (9 Cir. 1962);

Bech v. United States, 298 F.2d 622, 626 (9 Cir, 1962);

Russell v. United States, 288 F.2d 520, 521 (9 Cir. 1961).

It should be noted that Benton v. Maryland, No. 201, October Term, 1968, was reargued March 24, 1969, before the United States Supreme Court, on the question of the continuing validity of this rule of law.

IV

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of defendants Johnson and Johnson should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant United States Attorney,
Chief, Criminal Division,

LARRY S. FLAX,
Assistant United States Attorney,

Attorneys for Appellee
United States of America